No. 15315.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

M. W. ENGLEMAN, as Assignee for the Benefit of Creditors Generally of Campagnola Food Products, Inc., a Corporation,

Appellant,

vs.

GENERAL ACCIDENT, FIRE AND LIFE ASSURANCE CORPORATION and INSURANCE COMPANY OF NORTH AMERICA, a Corporation,

Appellees.

APPELLEES' BRIEF.

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Statement of the Case.

These cases, consolidated for trial before a jury, were tried upon the issues made by plaintiffs' second amended and supplemental complaints against the two defendants, appellees herein [Tr. pp. 20-28], and defendants' separate answers thereto. [Tr. pp. 32-33, 14-17.]

After stipulations and admissions, there were no substantial issues raised except those raised by Paragraphs IV of the separate second amended and supplemental com-

plaints and defendants' denials thereof. These allegations were as follows:

IV.

Thereafter and prior to the night of August 7, 1954, the Insurance Company entered into an additional and oral agreement with Campagnola under which the Insurance Company additionally insured Campagnola against loss by fire of equipment of Campagnola, for a sum of $15,000.00, besides the foregoing sum of $12,000.00 specified in the said policy; that the said agreement was separate from the policy; that the period for such additional insurance commenced from August 2, 1954, and was to expire on May 10, 1955; the property insured against was equipment of Campagnola; the risk insured against was fire; there was to be a premium and consideration for such additional agreement of insurance, in accordance with customary rates. [Tr. p. 21, f. 21; p. 25, f. 25; p. 14, f. 11; p. 16, f. 14; p. 32, f. 31, 32.]

The case came on for trial on June 19, 1956, and the plaintiff introduced his evidence and on June 20, 1956, rested his cause.

Defendants, and each of them, thereupon made the following motion:

> 1. Plaintiff having rested, defendants and each of them separately moves the court to direct the jury to return its verdict in favor of defendants and each of them upon the ground and for the reason that plaintiff's evidence has failed to establish facts or inferences therefrom upon which a verdict of the jury could be based in plaintiff's favor against defendants or either of them, specifically in that there is no evidence that defendants or either of them entered into an oral contract of insurance with the plaintiff's assignor.

2. There is no evidence that anyone authorized by defendants or either of them entered into an oral contract of insurance with plaintiff's assignor.

3. There is no evidence or inference therefrom that defendants or either of them are estopped to deny that the oral contract was entered into by them or either of them.

4. There is no evidence that witness Charles Richard Love had any authority to enter into an oral contract of insurance on behalf of defendants or either of them. [209.]

5. There is no evidence that Charles Richard Love did enter into any oral contract with plaintiff's assignor on behalf of defendants or either of them. [Tr. pp. 193-194, ff. 208, 209.]

After argument, the Court, treating the motion for directed verdict as a motion to dismiss, ordered a dismissal of the actions without prejudice. [Tr. p. 209, f. 226; p. 37.] Thereafter, the Court entered formal judgment of dismissal without prejudice. [Tr. pp. 38, 39.]

Statement of Facts.

The issues on this appeal are simple and resolve into the single question,

> "Did Appellant produce sufficient testimony and evidence, resolving the same and all reasonable intendments therefrom in his favor, to establish that his assignor had entered into contracts of insurance with each of the Appellees as alleged?"

The evidence, which consisted of the testimony of two witnesses, Kenneth H. Klee and Charles Richard Love, and the documents introduced during their testimony, shows the following:

Kenneth H. Klee testified that he was at all times in the suit material an insurance agent and broker in Los Angeles, California, and had conducted his business under the name of The Klee Insurance Agency for about six and a half years. He was the duly appointed and acting agent of appellee, General Accident and Life Assurance Corporation, Limited, under a written agency agreement [Pltf. Ex. 1, Tr. p. 85, f. 101], and also the duly appointed and acting agent for appellee, Insurance Company of North America, under a similar written agency appointment. [Pltf. Ex. 2, Tr. p. 90, f. 101; p. 96, f. 104.]

Since 1950, Klee and witness, Charles Richard Love, had shared offices, occupying desks across from each other; they shared telephone, stenographic, and other expenses. Although each individually transacted business for their own accounts, they would, as a matter of courtesy, when one was sick or on a vacation, watch the business of the other and help each other although they did not pay each other commissions unless they worked on a case jointly. Generally speaking, they maintained their own entities, and although they shared office expenses, they each operated independently. [Tr. p. 96, f. 105; 116, f. 122.] During all the time that Klee and Love shared offices together, they each had brokers licenses, and each placed business with the other in companies which the other represented. [Tr. p. 141, f. 151.] Klee had never had any discussion with appellee, General Accident [Tr. pp. 97, 98, f. 106], nor with the appellee, Insurance Company of North America, other than about his, Klee's, appointment as agent. [Tr. p. 100, f. 109.]

In reference to appellee, General Accident, Love had an agency appointment with this appellee, and after his

agency was cancelled, he placed or renewed some of his business through The Klee Agency. [Tr. p. 103, f. 112.]

He had no relationship with the Campagnola Food Products, Inc. insurance, other than when Love first got the line and had to place it. Love represented the General Accident, and the fire facilities were quite limited, and Love asked him where he could place the balance, and he suggested to him that he call the Insurance Company of North America and see if they would take the insurance, and he later learned that the Insurance Company of North America did take this insurance and placed it through his, Klee's, agency. [Tr. p. 104, f. 113.]

With reference to the transaction in controversy, he knew or heard nothing about it until after the fire on Sunday when he noticed in the paper that Campagnola had suffered a fire loss, and he called Love to see if he had read it, and Love told him that he did not know about it, and that he had ordered some additional insurance on the line the previous week. [Tr. p. 106, f. 116; p. 109, f. 119.]

Charles Richard Love testified that he was an insurance agent and had been in the insurance business approximately eight years and had started as agent in his own capacity about July of 1950, occupying an office with witness Klee and testified substantially the same as witness Klee as to the arrangements between them in the matter of sharing expenses and facilities. [Tr. p. 141, p. 142, ff. 152, 153.]

That he had been appointed agent for appellee, General Accident Fire and Life Assurance Corporation, by written appointment in September, 1950, and that his

appointment had been revoked on November, 1952, and the notice of revocation filed with the Insurance Commissioner, and he received notice of the revocation on November 21, 1952. [Tr. p. 143, ff. 153, 154; p. 167, f. 179; p. 169, f. 181.]

That he had been handling the insurance for Campagnola Food Products, Inc., Appellants' assignor, since 1951, and was handling a major portion of it. That Mr. Esposita was the only man he dealt with in Campagnola with the exception of the bookkeeper occasionally. [Tr. p. 174, f. 186; p. 178, f. 191.]

That on May 16, 1952, as agent for General Accident Fire and Life Assurance Corp., he executed and delivered to Campagnola a policy of insurance. When this policy expired on May 16, 1953, after the cancellation of his agency appointment, the business was transacted in Mr. Klee's name [Tr. p. 147, f. 158; p. 179, f. 193], and after his agency was cancelled, he could not write the policy in the General Accident so he placed the insurance that was expiring in the General Accident through Mr. Klee as agent for the General Accident. [Tr. p. 180, f. 194.] He explained that he meant by "placing" that he would offer a piece of business to a company and have them accept it and issue a policy; that is, he would submit the proposal to the company for their acceptance or rejection, and in many instances he submitted business to Mr. Klee or submitted it directly with Mr. Klee's authorization, and such business was submitted to companies for their acceptance or rejection. [Tr. p. 171, f. 184; p. 172, f. 184; p. 172, ff. 184, 185.]

As to Appellee, Insurance Company of North America, he transacted the Campagnola policy issued in 1952 through Mr. Klee on this basis. [Tr. p. 148, f. 159.]

He was not, and never had been, agent for the Insurance Company of North America, and had been agent for the General Accident only during the period from September, 1950, to November, 1952, when his agency was cancelled. That after the cancellation of his agency, he never held himself out to Appellant's assignor or to anyone else as having authority to bind the General Accident. [Tr. p. 171, f. 183.]

In August of 1954, there were two fire insurance policies in effect so far as is material in this issue, one with the Appellee, General Accident, for $11,000.00, which had been placed by Love through the Klee Agency effective May 16, 1953 [Tr. p. 21, f. 21], and the other with Appellee, Insurance Company of North America, for $12,000.00 effective May 10, 1952, which had been placed by Mr. Love through the Klee Agency. [Tr. p. 25, f. 25.]

Prior to July 30, 1954, Mr. Love had lunch with Mr. Esposita, representing Appellants' assignor, and was told that some financial rearrangements were in process, and that the fire insurance would probably have to be increased, as there would be loans involved, and the lenders would want additional protection. Mr. Esposita did not state who the lenders would be but advised Mr. Love that he would let him know if the increase was to be made. [Tr. p. 176, f. 189.]

On July 30th, Mr. Love called the bookkeeper at Appellants' assignor's place of business on another matter, and after he had finished his conversation, Mr. Esposita came on the telephone and, in substance, told him to "go ahead and place that other $50,000.00 of fire insurance which we discussed some time ago." [Tr. p. 149, f. 160.] Esposita told Love that the deal they had dis-

cussed had gone through, and he wanted the additional insurance they had discussed, and Love stated to him that he would immediately make application to insurance companies to see if he could place the business. [Tr. p. 174, f. 187.] Love did not tell Esposita what companies he was going to make application to and did not tell him when the contract, if any were made, would go into effect. He did not tell him how the $50,000.00 was to be divided between any companies if he could place it, and he did not discuss with him for how long the insurance would endure, the terms or the end of it, and did not discuss with him the rate. He did not discuss with him the parties to the contract, that is, the loss payees who were to be placed on the policies. [Tr. p. 174, f. 187; p. 175, f. 188.] This telephone convervation of July 30, 1954, was the last and only conversation Mr. Love had with Mr. Esposita until after the fire. [Tr. p. 184, p. 199.]

Mr. Love did not immediately make any effort or attempt to place this insurance but on April 2, 1954, sent by regular mail to the General Accident a letter as follows:

"Love Insurance Agency
510 W. Sixth Street
Los Angeles 14, California

To: Gen. Acc.

Subject: Campagnola #784651.

Attention:

Date: 8-3-54

Will you increase your line by endorsement to $25,000 part of total line of $88,000. Advise immediately.

Dick Love"

and to the Insurance Company of North America a letter as follows:

"Love Insurance Agency
510 W. Sixth Street
Los Angeles 14, California

To: Ins. Co. North Am.
Subject: Campagnola #61296
Attention: Fire Und.
Date: 8-3-54

Will you endorse to increase your line to $27,000, part of total line of $88,000. Advise immediately.

K. H. KLEE"

[Pltf. Exs. 4, 5, p. 152, p. 153, f. 164.]

Mr. Love received no answers to these communications until after the fire, although he received several telephone calls from Insurance Company of North America, which were abortive for the reason that he was not in when the calls were made and the person who had called him was not in when he returned the calls. [Tr. p. 185, p. 186, ff. 199, 200.]

The fire occurred on August 7th and the amount of loss and the performance of conditions precedent was stipulated to.

ARGUMENT.

It would seem that a recitation of the facts adduced at the trial would be its own argument, as these cases must be, and were by the trial court, determined on the most elementary principles of contract law.

When stripped of extraneous matters, all of the material testimony can be briefly summarized.

Kenneth H. Klee and Charles Richard Love were each insurance agents and brokers, sharing offices and office expenses, but were not partners and maintained their own entities and operated independently. Klee at all times herein was the duly appointed and acting agent for each of the Appellee insurance companies, but had nothing to do with the transaction herein involved and knew nothing about it until after the property had been destroyed by the fire of August 7, 1954.

Love at the time of the transactions herein involved was not the agent for either of the Appellees, although he had been agent for General Accident from September, 1950, to November, 1952, when his agency was cancelled, and after the cancellation he had never held himself out to Appellants' assignor or to anyone else as representing or having authority to bind the General Accident.

Love had a client or customer, Appellants' assignor Campagnola Food Products, Inc. with whom he was transacting considerable business. In May of 1952, he procured fire insurance for Campagnola, one policy for $12,000.00 with Insurance Company of North America, which he negotiated with said insurance company through Mr. Klee as its agent. The other policy for $11,000.00 with General Accident he himself issued as agent for the General Accident. When this General Accident policy

expired in May of 1953, after his agency with said company had been revoked, he caused it to be renewed through Mr. Klee, as agent for said company.

Prior to July 30, 1954, Love had a conversation with Mr. Esposita, Campagnola's President and Manager, wherein he was advised that Campagnola was making some financial arrangements and that the lenders would want additional insurance protection, and on July 30, 1954, in a telephone conversation, Esposita told Love that this deal had gone through and he wanted the additional insurance they had discussed and to place $50,-000.00 additional insurance, and Love stated to him that he would immediately make application to insurance companies to see if he would place the insurance.

Thereafter, and on August 2, 1954, Love sent to the two Appellees the letters of inquiry. [Pltf. Exs. 4, 5.] No other transactions whatsoever were had regarding the matter until after the fire.

This is the whole story and where Appellant can find evidence in the record or a theory of law to torture it into an insurance contract with either of the Appellees certainly does not appear in either Appellant's brief or in his statements of points. The facts here are so simple that it would seem trite and presumptuous to cite authority for the simple rules of contract involving offer and acceptance, privity and mutuality or the other simple elements of all contracts.

But see:

Cal. Civ. Code, Secs. 1550, 1565.

And insurance contracts are governed by the same general rules which pertain to all contracts. As said in the

case of *Gandelman v. Mercantile Insurance Co.,* 90 Fed. Supp. 472 (affirmed by this court 187 F. 2d 654):

> "Insurance policies are governed by the same general rules which pertain to all contracts and the alleged contracts of insurance must meet the same test that would apply to any contract. K. C. Working Chemical Co. v. Eureka Security Fire & Marine Ins. Co., *supra;* 14 Cal. Juris. 416. Tested by the ordinary rules of contract there must have been a meeting of the minds, supported by an offer and acceptance. K. C. Working Chemical Co. v. Eureka Security Fire & Marine Ins. Co., *supra.* In the case at bar there never was an offer or acceptance or meeting of the minds of the parties. . . ."

In *Stevenson v. Sun Insurance Office,* 17 Cal. App. 280, 119 Pac. 529, the Court said:

> "A contract of insurance must be governed and interpreted by the same rules which ordinarily apply to other contracts, and it will be enforced only according to the manifest intention of the parties."

In *Boyer v. United States Fidelity & Guaranty Co.,* 206 Cal. 273, 247 Pac. 57, the Court said:

> "Insurance policies are governed by the same general rules which pertain to all contracts. There must be a meeting of the minds."

See also:

Mauck v. Northwestern Nat'l Ins. Co., 102 Cal. App. 510, 283 Pac. 338;

Wells Fargo & Co. v. Pacific Insurance Co., 44 Cal. 398;

Bassi v. Springfield Fire Ins. Co., 57 Cal. App. 707, 208 Pac. 154;

Boole v. Union Marine Ins. Co., 52 Cal. App. 207, 198 Pac. 416.

Since, as we believe, the answer to this appeal is found in such elementary rules of law, we will not at this point attempt to justify them but will examine Appellants' brief to see whether or not he has demonstrated that cardinal principles no longer exist and will present our points and authorities in the order as set up in Appellants' argument.

I.

Appellees' Answer to Appellant's Point I.

Appellant first argues that the evidence must be viewed most favorably to the Plaintiff. This we admit and no citation of authority is necessary.

II.

Appellees' Answer to Appellant's Point II.

Appellant next argues that insurance contracts may be oral. This is true, and the necessary elements upon which the minds of the parties must meet to constitute an oral contract of insurance have been thoroughly settled in the Courts of California and in this Circuit.

In *American Can Co. v. Agricultural Ins. Co.,* 12 Cal. App. 133, 106 Pac. 720, the Court said:

> "A parol contract of insurance may be made and is enforceable; but as such contracts are rarely made, and are not made in the usual and ordinary course of business, the proof of such oral contract must be clear and convincing. In fact, it is the universal custom of insurance companies to issue written policies, with full and minute specifications as to their liability and the exceptions that would make the policy void. The preliminaries, as in contracts for the sale of real estate, are usually only negotiations which are afterward merged into the written contract.

> Hence it is at once apparent, even to the layman, that in the somewhat unusual claim that an oral contract of insurance was entered into, the only safe and sound rule is to require the proof to be clear and convincing to the effect that the contract was actually entered into, that each party understood it in the same light, and in regard to the same subject matter. (*Kerr on Insurance,* 52, sec. 33; 13 *Am. & Eng. Ency. of Law,* p. 221; *Cleveland Oil & Paint Mfg. Co. vs. Norwich Union Fire Ins. Co.,* 34 Or. 228, (55 Pac. 435).)"

The Court further said in this case:

> "A contract is an agreement to do or not to do a particular thing. It must be by consent, which is free, mutual and communicated by each to the other. The consent is not mutual unless the parties all agree upon the same thing in the same sense, and unless they do so agree there is no contract. How can it be said that the defendant agreed to issue a policy to plaintiff when the name of plaintiff was not even mentioned nor in any way communicated to defendant in the oral conversation?"

See also:

Gandelman v. Mercantile Ins. Co., supra;

Law v. Northern Assurance Co., 165 Cal. 394, 132 Pac. 500;

Toth v. Metropolitan Life Insurance Co., 123 Cal. App. 185, 11 P. 2d 94.

We are quoting from *K. C. Working Chemical Co. v. Eureka Security Fire and Marine Insurance Co.,* 82 Cal. App. 2d 120, 185 P. 2d 832, to avoid the numerous citations of authorities that might be given as in this case

Judge Vallée epitomized the rules relating to oral contracts of insurance and cited numerous authorities. In that case, the Court said:

> "To constitute a verbal contract of insurance the minds of the parties must have met upon all of the essential elements of the contract. The testimony must make clear the subject-matter of insurance, the amount and elements of the risk, including its duration in point of time and extent in point of hazard assumed, the rate of premium, and generally all the circumstances which are peculiar to the contract and distinguish it from every other so that nothing remains to be done but to fill up the policy and deliver it, on the one hand, and pay the premium on the other. (Citing cases.) * * *
>
> "Oral contracts of insurance must be definite and certain. The parties must agree on all of the essential terms. (Citing cases.) * * *
>
> "To constitute a valid contract of insurance the minds of the parties must have met on the identity of the person with whom they are dealing. (Citing cases.) * * *
>
> "A contract of insurance is not effected by a transaction which does not supply the element of mutuality of agreement and mutuality of obligation. (Citing cases.) * * *
>
> "Until an application for insurance is accepted, no contractual relation exists between an applicant for insurance and an insurance company. (Citing cases.) * * *
>
> "An insurance company is not bound to accept an application or proposal for insurance but may reject it for any reason or arbitrarily. (Citing cases.) * * *

"A mere intention or mental determination on the part of the insurer to accept the application is not of itself sufficient to effect a binding contract. (Citing cases.) * * *

"A contract of insurance must be assented to by both parties either in person or by their agents. (Citing cases.) * * *

"There can be no enforceable contract of insurance if the insured and an agent who represents several companies fail to designate one of the companies before a loss occurs. (Citing cases.) * * *

"It is held in a number of cases that payment of the premium is a condition which must be fulfilled if temporary insurance is to be considered as affording protection to the applicant. (Citing cases.) * * *

"Mere delay in acting on an application does not create a contract of insurance. (Citing cases.)"

Examining the evidence in light of the law where, how and when was any oral contract of insurance entered into between Appellants' assignor and either of the Appellees by which they became mutually bound.

Clearly, no contract was consummated or assumed to be consummated in the brief telephone conversation which Love had with Assignor's manager, Esposita, on July 30, 1954. The most that can be gotten out of this was that Esposita told Love to place $50,000.00 insurance and Love told him he would make application to insurance companies and see if he could place the business. Love did not tell him the names of the companies he was going to make application to or how the $50.000.00 was to be divided between companies. (As said in the *Gandelman* case, *supra,* this itself was fatal to a contract.)

He did not tell him when the contracts if they were made would go into effect. He did not discuss with him how long the insurance would endure. He did not discuss with him the rate. He did not discuss with him the parties payee. In other words, all that passed between Love and Esposita was Esposita's desire to get $50,000.00 additional insurance and Love's agreement to attempt to get it for him.

Moreover, Love could not have entered into a contract with Esposita on behalf of either of the Appellees if he had tried. He was not the agent of either of the Appellees, and although he had been agent for General Accident for a short time, his agency had been cancelled, and after its cancellation, he did not act or assume to act as agent for said company and did not and had not held himself out either to Appellants' assignor or anyone else as having authority to bind the General Accident.

If oral contracts of insurance did not arise, as they clearly did not, with this transaction, when did they arise?

The only other act or conduct relating to the matter was the sending by Love of the two letters dated April 3, 1954, to the respective Appellees [Pltf. Exs. 4, 5 above quoted], to which no answers were received until after the fire on August 7, 1954. An examination of these exhibits will show that they are not even proposals to the Appellees but, on the contrary, are mere inquiries. One says "Will you increase your line by endorsement . . ." and the other says: "Will you endorse to increase your line . . ." Suppose each of the Appellees had answered "Yes." There still would have been no contract. Love would have had to come back and accept

it. However, nothing was done, and as shown by the authorities above cited, an insurance company is not bound to accept an application or proposal for insurance; and a delay in acting on an application does not create a contract, if we can assume the three or four days interval was a delay.

Aside from the two instances just referred to, there is absolutely nothing in the evidence relating to a meeting of the minds with anybody or for any specific contract or contracts.

III.

Appellees' Answer to Appellant's Point III.

Appellant's next argument which is under this sub-head is the statement that where there is a custom which requires an insurer to promptly decline a risk or else be bound thereby a contract of insurance is formed if he fails to act promptly in refusing the risk.

Cases cited on pages 16 and 17 of Plaintiff's brief and even the quotations therein do not even remotely bear out the statement made out in this sub-head, and we do not propose to burden this brief by a detailed analysis of these cases, but will state categorically that an examination of the cases show that they are all cases where an agent with actual or ostensible authority had actually entered into a completed contract with the applicant subject to his company's rejection, and the Courts, of course, held that the risk under those conditions was bound until rejected by the company.

But in this case, there was certainly no binding of any company by the transaction with Esposita, or the sending of the letters.

IV.

Appellees' Answer to Appellant's Point IV.

Under this sub-head, Appellant makes the categorical statement that a definite and certain contract of fire insurance was entered into between Appellants' assignor and Defendant insurance companies. We have already answered this contention under sub-head II, and will say nothing more about it.

He also under this sub-head states that the usual and ordinary terms of a fire insurance contract will be implied into the agreement.

We can agree with this; that is, as the cases which counsel has cited amply show in a fire insurance contract it will be presumed that the standard form of policy will be used, and if the contract for renewal is entered into, that the new oral contract would follow the terms of the previous policy. But this is speaking of the detailed terms and form of the contract and not of the essential elements such as the amounts, the divisions, between companies and the other elements that relate to the particular transaction as above discussed. Obviously, the form of the contract is immaterial until there has been a meeting of the minds.

V.

Appellees' Answer to Appellant's Point V.

The last struggling effort of Appellant to make a case is under his sub-head V in which he makes the remarkable statement that Love acted as agent for all parties and had knowledge of the terms and conditions of the insurance contract and, therefore, his knowledge is imputable to the insurance company in order to show a meeting of the minds.

Appellant cites several cases on pages 25 and 26 of his brief to attempt to justify this remarkable theory, but an examination of these cases will show that in each and every one of them where a party was permitted to act as agent for both parties with the full knowledge and consent of both, and where the transactions were not inconsistent or incompatible with his duties to either.

But here Love was not even an agent for either of the Appellees and he knew he was not their agent, and he did not act, or assume to act, as their agent and had never done so or held himself out as authorized to do so after the cancellation of his General Accident agency. We wonder if Appellant is claiming that Love could have estopped himself as against himself and thereby create a contract in his own mind.

Appellant has discussed custom. Aside from the facts that Love testified that he did not know that certain customs of the business that he testified to were recognized

by either of the Appellees, it is too well settled for controversy that although custom and usage may be shown as an instrument of interpretation it can never be used to create a contract.

Cal. Code Civ. Proc., Sec. 1870 (12);

Hanley v. Marsh and McLennan, 48 Cal. App. 2d 787, at 798, 117 P. 2d 69;

Ghiselin v. John Hancock Mutual Life Ins. Co., 79 Cal. App. 2d 438, 180 P. 2d 50.

Appellees respectfully submit that the trial court did not err in taking the case from the jury and dismissing the action and that there is not a scintilla of evidence in the whole case upon which a verdict against Appellees could have been sustained.

Respectfully submitted,

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By E. EUGENE DAVIS,

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